

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

76-5026

United States Court of Appeals
For the Second Circuit

In the Matter
of

BANQUE DE FINANCEMENT, S.A.,

Debtor-Appellant.

BRIEF OF THE FIRST NATIONAL BANK
OF BOSTON, APPELLEE

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BANQUE DE FINANCEMENT, S.A.,

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BRIEF OF THE FIRST NATIONAL BANK OF BOSTON, APPELLEE

Issue Presented for Review

Were the concurrent findings of both the District Court and the Bankruptcy Court clearly erroneous and did they abuse their discretion in dismissing Appellant's Chapter XI Petition?

Preliminary Statement

This is an appeal from an Order of the District Court, per Honorable Robert Ward, dated July 28, 1976, affirming an Order of the Bankruptcy Court, per Honorable Roy Babitt, dated January 12, 1976 which granted the motion of Respondent, The First National Bank of Boston ("Boston Bank"), joined by Chase Manhattan Bank ("Chase

Bank'') and dismissed the voluntary Petition under Chapter XI of the Bankruptcy Act ("Act") filed by Debtor-Appellant, Banque de Financement, S.A. ("Finabank").

Judge Ward's Memorandum and Order (A. 277-84)* concludes:

"Considering all of the foregoing and upon review of the entire record, the Court finds that the Bankruptcy Judge acted within his discretion in dismissing the case." (A. 283).

The Courts below granted the Banks' motions to dismiss the Petition in the exercise of the Bankruptcy Court's discretion, pursuant to its inherent power to dismiss and pursuant to Bankruptcy Rule 119.

In addition, the original motion (A. 10-12) had been based on two other grounds. First, that the Petition should be dismissed because the Debtor had failed in five respects to comply with the specific requirements of Chapter XI including its failure to make indispensable allegations under the Act and implementing Chapter XI Rules. The Bankruptcy Court found it unnecessary to determine separately this branch of the motion (A. 231-32)**; and second, that the plain language of Section 4(a) excepted from the reach of the Act foreign banking corporations. This Court, in *In re Israel-British Bank (London) Ltd.*, 536 F.2d 509 (2d Cir. 1976), *petitions for cert. pending*, 45 U.S.L.W. 3203-04 (U.S., filed Aug. 23, 1976, Nos. 76-271, 272), reversing Judge Lasker, held that despite the language of

* References are to the Joint Appendix.

** In the event this Court reverses, remand to Judge Babitt for decision on this point would be the appropriate procedure.

Section 4, foreign banks are subject to the jurisdiction of Bankruptcy Courts. Accordingly, the present rule in this Circuit is that foreign banks such as Finabank are not *ipso facto* barred from the benefits of the Act, and except to note that we would preserve our contention to the contrary for further proceedings, the Section 4 point will not be further dealt with in this brief.

The Facts

In January 1975, Chase Bank and Boston Bank each filed separate actions in the Court below against Finabank for \$491,000 and \$9,176,375 damages respectively for breach of forward foreign exchange contracts. Each of the Banks obtained Orders of Attachment in the said sums plus interest, etc., which were duly levied upon a number of New York banks, and resulted in the attachment of over \$12,000,000 held by Continental Bank International ("CBI") in Finabank's name (these are the assets of Finabank involved in this Chapter XI proceeding).

Thereafter, on January 21, 1975, CBI commenced an interpleader action seeking an adjudication of the ownership of the Finabank funds held by it. The interpleader action has been consolidated with the two separate actions by the attaching Banks, and the consolidated action is presently pending before Judge Werker. Each of the Banks has asserted its claim in this interpleader action based upon their respective attachment orders. Only two other domestic claimants, First National City Bank and Mario Einaudi have appeared and asserted claims totalling \$298,803. A number of foreign banks, corporations and individuals have also appeared in the interpleader action and asserted claims totalling several million dollars.

A. Finabank's Chapter XI Proceedings Below

On May 5, 1975, almost four months after the Boston Bank and Chase Bank attachments had been levied, Finabank filed its Petition for Chapter XI proceedings, thus purporting to stay the three foregoing actions now consolidated before Judge Werker. But the Petition failed to state either of the elementary allegations required of a Chapter XI voluntary petition by Section 323 of the Act, namely:

- (a) "that the debtor is insolvent or unable to pay his debts as they mature";
- (b) "the provisions of the arrangement proposed by him, or, that he intends to propose an arrangement pursuant to the provisions of this chapter."

At no time has Finabank ever sought to amend its Petition to assert either of these required allegations.

Instead, the Petition asserted merely that Finabank is a Swiss corporation "engaged in the business of banking"; that it has not had its principal business or principal assets in the United States during the past six months, but has assets in this district; that a petition for a "'sursis bancaire' (Postponement of Maturity)" which "contemplates the rehabilitation of petitioner" had been filed with a Swiss court on January 10, 1975, and that the Swiss court on January 20, 1975 appointed FIDES Societe Fiduciarie [FIDES], a Swiss corporation, as "Commissaire Provisoire" and that it has the authority to file the Petition. The Petition then referred to two exhibits purporting to be a list of creditors and a statement of petitioner's assets and the locations thereof. All of the listed creditors appear to be foreign banks with the exception of Boston Bank,

Chase Bank and Continental Illinois National Bank and Trust Company (which has never appeared or asserted any claim herein). No names or addresses of any creditors other than banks were set forth and, although the list included "Demand Deposits" and "Time Deposits," not a single depositor under either category was identified in any manner whatsoever.

B. Finabank's Refusal, Under Swiss Bank Secrecy Laws, to Identify Its Creditors

Although Finabank has, since filing the Petition, filed additional schedules, it has never set forth the names and addresses of any non-bank creditors. In its belatedly filed Schedule A-3, it asserted that over 164 million Swiss francs are owed unsecured creditors, but in the column "Name of creditor and residence or place of business," Finabank blandly inserted: "not required."

In fact, as Finabank well knew when it filed its Chapter XI Petition, it can never disclose the names of its creditor-customers, as required by the Act, even though it claims that \$11,000,000 of the approximately \$12,500,000 deposited in its name in CBI belongs to its customers and is not Finabank's property (Finabank Br. at 10 n. 4). The reason it cannot comply with our Bankruptcy Act lies in the Swiss laws of banking secrecy, to which it understandably prefers to comply, since their violation carries criminal penalties. Mathias Mayor, a Swiss attorney, in his affidavit in support of Boston Bank's motion, after quoting the applicable Swiss statutes,* summarized the Swiss Bank Secrecy Laws as follows (A. 50 at ¶4):

* Article 273, ¶2, Swiss Crim. Code; Article 47, Swiss Federal Banking Law.

"These provisions effectively prohibit . . . Finabank . . . from furnishing to a foreign court, or from directly or indirectly making public, the names and addresses of its depositors or creditors or divulging information concerning their dealings with Finabank, even after the filing of a plan for composition with creditors or a bankruptcy."

Finabank has never disputed this summary of the Swiss Banking Secrecy Laws. Rather, in its affidavit in opposition to the dismissal motion, Finabank asserted that it could at least reveal "the names of other banks" with which it had business relationships and then proposed (A. 53):

"Secondly, there is a procedure available which will permit full review of Finabank's records, without any violation of Swiss law. This entails requesting the United States Court to provide for a rogatory commission to the Geneva Court of Justice, which would, with the assistance of any delegate of the United States Court, review all relevant documents of the debtor."

At the hearing on the dismissal motion, Finabank's counsel candidly admitted that its non-bank creditors could not be identified in the Chapter XI proceeding but suggested (A. 178):

"Mr. Marrin: It [the Swiss Bank Secrecy Act] doesn't prohibit us with court supervision from writing a letter to each creditor and telling them about these proceedings. It's just so we couldn't publish the names."

The Bankruptcy Court rejected these procedures, stating:

"This Court is satisfied that this Chapter XI cannot comply with the most elementary and preliminary pro-

visions of the Act, much less with successful end result." (A. 227).

* * *

"The Court finds that here there is neither purpose to achieve the desired result nor likelihood of doing so. For one thing, this Court is not even informed, nor has it been, of who the creditors are. There is no basis upon which this debtor can formulate a plan affecting those creditors." (A. 229).

The District Court, in affirming the Bankruptcy Court, spoke to this point as follows (A. 281):

"Moreover, the debtor was legally prohibited by Swiss law³ from disclosing the names of a certain type of creditor, its creditor-customers, and although it proposes to cure this deficiency by giving each creditor-customer notice of the pendency of this proceeding and his right to file claims, the Bankruptcy Judge was within his discretion in rejecting this proffered alternative."

³Article 273, ¶2, Swiss Criminal Code; Article 47, Swiss Federal Banking Law."

C. Finabank's Admissions That There Was No Prospect of a Rehabilitation Plan

Finabank contended below, as it does on this appeal, that it was not afforded an opportunity, on adequate notice, to be heard on "Ability of Finabank to be Rehabilitated" and "Swiss Banking Secrecy Law" (Finabank Br., pp. 26-30).

The short answer to these contentions is, as Judge Ward found on review (A. 279), that Finabank had a full opportunity to be heard and to present any facts or contentions in opposition to the motion which it desired to present—

and in fact did so. Finabank could have, but did not, request any evidentiary hearing, and Judge Ward found that no evidentiary hearing "was required since the underlying facts were undisputed." (A. 279).

The transcripts of the several hearings before Judge Babitt show that continuously, from the very outset, Finabank's former counsel stated candidly that a Chapter XI arrangement for Finabank was next to impossible and Judge Babitt in turn strongly expressed his view that the Chapter XI proceedings were wholly inappropriate and ought to be dismissed.

At the June 10, 1975 hearing, counsel for Finabank, Richard Marrin, Esq., of Mudge Rose Guthrie & Alexander, stated—and Judge Babitt responded—as follows (A. 106):

"... Your Honor, there are certain problems over in Switzerland in deals with other banks that makes it very unlikely we can ever put over a Chapter XI in this situation.

"The Court: Good. Let's adjudicate or dismiss it."

At the July 8, 1975 hearing, after Boston Bank had made its motion to dismiss on the various alternative grounds stated above, the following colloquy occurred (A. 117-18):

"The Court: I told you, Mr. Marrin, I don't see this as a Chapter XI proceeding.

"Mr. Marrin: I agree, Your Honor.

"The Court: I can't think of a less likely Chapter XI than this involving an estate where eighty-five percent belongs to key depositors and the only purpose of the Chapter XI was to frustrate the attacher."

After Judge Babitt made reference to another of the grounds for Boston Bank's motion, lack of jurisdiction over Finabank, the colloquy continued (A. 118-19):

"The Court: I have the added string in my bow, this is not fit meat for Chapter XI and I would have the inherent power to dismiss by the authority of *Ira Haupt* against *Klebanow*.

"Mr. Shaw: That is correct, Your Honor.

"The Court: Mr. Marrin?

"Mr. Marrin: Your Honor, we agree with what you say, that you have the inherent power."

On appeal, Judge Ward, too, agreed (A. 280).

At this same July 8, 1975 hearing, Judge Babitt scheduled the hearing on Boston Bank's dismissal motion for August 19, 1975 and cautioned counsel for Finabank (A. 124):

"You might want to pay attention, Mr. Marrin, to the question of whether this is meat for a Chapter XI as Congress intended that statute to be.

"Mr. Marrin: We intend to answer that in these papers. We think it is."

Significantly, no creditor other than Bank Firestone* joined Finabank in opposing the dismissal (and none has since appeared in opposition). Both Finabank and Bank Firestone in their briefs, and Finabank in its affidavits, submitted to the Bankruptcy Court in opposition to the motion, presented the same factual and legal contentions, or in any event had full opportunity to do so, which they now present to this Court. The claim that they were not accorded a full and fair opportunity to be heard is without merit.

* A Swiss bank which has recently assigned its claim to Intervenor Firestone Tire & Rubber Co.

Moreover, far from demonstrating any real possibility of rehabilitation, Finabank's former counsel was able to contend, in its memorandum submitted to Judge Babitt in opposition to the motion to dismiss, only that there was but the barest possibility of rehabilitation:

"Since the filing of the Petition under Chapter XI, the feasibility of structuring a Plan acceptable to all creditors has gradually diminished although it still remains a possibility." (Mem., p. 5);

and again the memorandum refers to:

". . . the slim likelihood at present of the successful formulation of a Plan," (Mem., p. 37).

It is no wonder that, on appeal, Judge Ward would later conclude that "Judge Babitt's finding, '. . . that here there is neither purpose to achieve the desired result [a rehabilitation plan] nor likelihood of doing so, . . . ' [was] clearly supported by the concessions of Finabank's counsel" (A. 280).

Moreover, at the hearing of the motion to dismiss on August 19, 1975 all of the points relied upon by Judge Babitt in his decision were thoroughly canvassed, and Judge Babitt made it very clear that he intended to do precisely what he did (A. 183-85):

"The Court: Tell me about your petition. Is it as bad as they say?—The answer is yes. Can you do anything about it?—The answer is no.

* * *

"Why don't I dismiss the petition in the exercise of a discretion I have? Does anyone doubt that I could not now adjudicate you a bankrupt because you didn't file a plan or dismiss it on the ground you didn't file a plan? No one doubts this right."

Having delivered this stern warning, Judge Babitt nevertheless directed Finabank to file its arrangement "by September 3, 1975" (A. 131). Finabank failed to file by September 3, and on September 4, Judge Babitt directed Finabank to file "by October 8" (A. 198). Again, Finabank failed to comply and at the hearing on October 9, Judge Babitt directed Finabank to file "by November 10" (A. 203). Again, Finabank failed to comply with this direction and at a hearing on November 11, Judge Babitt directed Finabank to file "by December 15" (A. 208).

When Finabank once again failed to comply, Judge Babitt at the December 16, 1975 hearing stated that he was working on his decision on the dismissal motions and that he was going to dismiss the Petition, stating that "I have independent grounds to dismiss this petition as improvidently filed" (A. 211) and he directed Finabank to file by January 26, 1976, declaring, however, "It's a meaningless, futile direction . . ." (A. 218).

At none of these later hearings did Finabank give any inkling that there was any prospect of rehabilitation or of a plan, or seek to offer any further relevant evidence or information. Specifically, at the December 16, 1975 hearing, counsel for Finabank neither raised any question concerning the clear statement by Judge Babitt that he intended to dismiss the Petition "as improvidently filed" nor did they ask for any further hearing on the issue. Yet, it now contends that because Judge Babitt *pro forma* adjourned the filing date, he should have held an additional hearing before handing down his decision dismissing the proceeding. Any such additional hearing would plainly have been meaning-

less and futile, as he expressly stated in reciting the adjournment (A. 217-18):

“The Court: As far as the Chapter XI, I will adjourn it for a few weeks, *because I think it will all be disposed of by then.*

“January 27th, at 8:30 I am going to adjourn all these matters to. The debtor is directed to file its plan by January 26th. It’s a *meaningless, futile* direction, but I am compelled by the scheme of the statute to do it.” (Emphasis added.)

Neither Finabank nor Bank Firestone offered any comment or request for a hearing in response.

Nothing in the record and no facts cited in Finabank’s brief remotely suggest that a plan would have been filed either by January 26, 1976 or at any subsequent time. Finabank’s brief contends rather that there should have been still another hearing before dismissal. Finabank’s counsel made this same contention on its application for a stay pending appeal at a Hearing held on January 29, 1976 and Judge Babitt replied (A. 242):

“The Court: I just told you that you misapprehend the scheme of the Act. *You had a hearing on notice.* Not only was there a motion to dismiss but there need not even have been a motion to dismiss because under the unfolding of a Chapter XI, this Court has the power at any time to dismiss or adjudicate without a special hearing being convened for that purpose.” (Emphasis added.)

The Decisions Below

A. The Bankruptcy Court Decision

Judge Babitt reviewed the foregoing, including Finabank's failure to identify its creditors and made his key finding of fact (A. 229):

"The Court finds that here there is neither purpose to achieve the desired result [a rehabilitation plan] nor likelihood of doing so."

The Bankruptcy Court then decided to exercise its inherent power to dismiss the Petition as follows (A. 229):

"Clearly, this Court has inherent power to dismiss such a fragile vehicle for Chapter XI relief. *In re Ira Haupt & Co. v. Klebanow*, 348 F.2d 907 (2d Cir. 1965). This case presents an even more compelling fact pattern in the exercise of this Court's discretion in terminating the debtor's relationship with the Bankruptcy Act than in the *Haupt* case."

In addition, the Bankruptcy Court decided to exercise its discretion to dismiss, expressly provided for in Bankruptcy Rule 119, which all parties conceded was applicable. The Court noted Finabank's contention, again urged on this appeal, that it also had discretion under Rule 119 to have some sort of "concurrent administration of the debtor's estate" together with the Swiss Court. The Court ruled that such concurrent administration "is not warranted in the exercise of this Court's discretion" and that under Rule 119:

"... the Court is given the option to dismiss, rather than suspend the American proceedings, in favor of

having the foreign proceedings go forward. The Court chooses to dismiss, assuming it had jurisdiction at all, so that the foreign proceedings may go forward regardless of their dissimilarity from our own." (A. 232).

B. The District Court Decision

Judge Ward, on appeal from the Bankruptcy Court Decision and Order of dismissal, specifically affirmed Judge Babitt's findings of fact and concurred in his exercise of discretion in dismissing the case on both the grounds of inherent power to dismiss and Bankruptcy Rule 119 (A. 277-84).

Judge Ward carefully reviewed the proceedings before Judge Babitt, referred to above, and concluded as follows with respect to them (A. 280):

"Assuming, *arguendo*, that Finabank was not in default of filing a plan, Judge Babitt nonetheless was empowered to dismiss the Chapter XI petition upon his determination 'that there is no prospect of rehabilitation and that ordinary bankruptcy [or Chapter X] is the appropriate vehicle.'" *Ira Haupt & Co. v. Klebanow*, 348 F.2d 907, 908 (2d Cir. 1965).

"Judge Babitt's finding, '. . . that here there is neither purpose to achieve the desired result [a rehabilitation plan] nor likelihood of doing so, . . .' is clearly supported by the concessions of Finabank's counsel set forth above."

"2. It is undisputed that an 'appropriate' proceeding, a 'sursis bancaire' (Postponement of Maturity), instituted by Finabank's own petition and contemplating its rehabilitation, is pending before the Geneva Court of Justice."

The Court emphasized Finabank's "deficiency" in failing to disclose the identity of its debtor-customers and spe-

eifically concurred in the Bankruptcy Judge's exercise of discretion in rejecting Finabank's proffered alternatives to complying with the Bankruptcy Act's requirement of such disclosure (A. 281).

The Court noted that all parties had again conceded that Rule 119 is applicable to this case, and adopted Judge Babitt's holding that Rule 119 provided explicit discretionary authority to dismiss in these circumstances.

The District Court concluded by affirming the dismissal upon the following express finding (A. 283):

"Considering all of the foregoing and upon review of the entire record, the Court finds that the Bankruptcy Judge acted within his discretion in dismissing the case."

POINT I

The concurrent findings of fact and exercises of discretion of both the District Court and of the Bankruptcy Court must be accepted on appeal unless clearly erroneous or a clear abuse of discretion.

This appeal is governed by Bankruptcy Rule 810 which provides for the "WEIGHT ACCORDED REFEREES' FINDINGS" as follows:

"The court shall accept the referee's findings of fact unless they are *clearly erroneous*, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses." (Emphasis added.)

As the Advisory Committee's Note states, Rule 810:

"... requires the same effect to be given the referee's findings as Rule 52(a) of the Federal Rules of Civil

Procedure accords to the findings of the trial court . . .
Simon v. Agar, 299 F.2d 853 (2d Cir. 1962).''

The Rule applies here *a fortiori* where the District Court, on appeal, has already concurred with the Bankruptcy Court's factual findings, conclusions and exercises of discretion.

Intervenor Firestone mistakenly contends that since no formal evidentiary hearing was held below and no question of witness' credibility existed, Rule 810's "clearly erroneous" test for appellate review is inapplicable (Firestone Br. at 10, fn.). The Supreme Court and all of the commentators are unanimously of the view that under Rule 52(a)—and thus under Rule 810—a trial court's conclusions cannot be set aside on review unless clearly erroneous even though they are based solely on documentary evidence or on inferences from undisputed facts. In *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194-95 n. 9 (1963), the Court applied the "clearly erroneous" standard to a disputed conclusion by a trial court with respect to motive and purpose as follows:

"Insofar as the conclusion is based on 'inferences drawn from documents or undisputed facts, . . . Rule 52(a) of the Rules of Civil Procedure is applicable.' *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948)."

See also: 9 Wright & Miller, *Fed. Practice and Proc.*, Civil §§2585, 2587 and cases cited (1971); 2B Barron & Holtzoff, *Fed. Practice & Proc.*, §1132 (1961).

Moreover, with respect to matters peculiar to the Bankruptcy Act and Rules and the ability of a Bankruptcy Court

to administer a bankrupt's estate such as this appeal presents, the expertise of a bankruptcy judge should be accorded great weight; this gives all the more reason to apply the "clearly erroneous" standard to the exercise of discretion vested in him by the Act and Rules.

As this Court stated in *Klein v. Morris Plan Industrial Bank*, 132 F.2d 809, 811 (2d Cir. 1942):

"The district court could 'see no reason to set aside the Referee's decision herein.' Nor can we. The statute obviously intends an extensive discretion in the trier of facts; and under General Order No. 47, his findings must be accepted unless clearly erroneous."

Again, in *In re Eloise Curtis, Inc.*, 388 F.2d 416 at 418 (2d Cir. 1967) this Court said:

"The referee's findings must be accepted unless they are clearly erroneous. General Order 47; Rule 52(a), Fed. R. Civ. P."

"In view of the evidence in this record supporting the findings of the referee we cannot say that he has abused his discretion in disapproving the designation of the Bureau as trustee."

And again, in *In re Ira Haupt & Co.*, 424 F.2d 722, 723 (2d Cir. 1970) this Court said:

"Where there are concurrent findings of fact by the referee and the district court the findings are accepted by this court unless they are clearly erroneous. *In re Ira Haupt & Co.*, 379 F.2d 884, 892 (2d Cir. 1967)."

Other courts concur:

"It is only where the court can say that there is a gross abuse of the sound discretion lodged in the

referee, that an appellate court will interfere." *Union Bank v. Blum*, 460 F.2d 197, 200 (9th Cir. 1972).

"We assume that a court has the right to dismiss a proceeding of the instant character when convinced that there is no longer need for reorganization. Admittedly, however, this is a matter which calls for the exercise of the court's discretion and we would be justified in interfering with its refusal to dismiss only upon a showing of a clear abuse of discretion. We think we need enter no discussion of the factual situation as bearing upon the court's discretion. It is sufficient to state that we find no abuse of the court's discretion in this respect." *In re National Realty Trust*, 166 F.2d 632, 635-36 (7th Cir. 1948).

"The question of the right to a discharge is addressed to the sound discretion of the bankruptcy court, with the exercise of which, except in case of gross abuse, an appellate court will not interfere." *Burchett v. Myers*, 202 F.2d 920, 926 (9th Cir. 1953).

POINT II

The Courts below had ample legal authority to dismiss.

The Bankruptcy Court is essentially a court of equity. *Katchen v. Landy*, 382 U.S. 323, 327 (1966) and cases cited therein. It is guided by equitable doctrines and principles except, of course, insofar as they might be inconsistent with the Act. As such, Bankruptcy Courts have always been held to have the inherent power to dismiss proceedings improvidently brought under the Act, leaving the debtor to his alternative remedies. The Supreme Court, in *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 457-58 (1940) stated:

"Before the enactment of Chapters X and XI, the district court in a 77B proceeding was 'not bound to clog its docket with visionary or impracticable schemes of resuscitation,' however honest the efforts of the debtor and however sincere its motives, and it was its duty to dismiss the proceeding whenever it appeared that a fair and equitable plan was not feasible, leaving the debtor to the alternative remedy of bankruptcy liquidation, see *Tennessee Publishing Co. v. American National Bank*, 299 U.S. 18, 22. And it has long been the practice of bankruptcy courts to permit creditors or others not entitled to file pleadings or otherwise contest the allegations of a petition, to move for the vacation of an adjudication or the dismissal of a petition on grounds, whether strictly jurisdictional or not, that the proceeding ought not to be allowed to proceed." (Footnote omitted.)

SEC v. United States Realty & Improvement Co. was in turn relied upon by this Court in *In re Ira Haupt & Co. v. Klebanow*, 348 F.2d 907, 908 (2d Cir. 1965) for the proposition that a Bankruptcy Court has:

"... inherent power to dismiss a Chapter XI petition where relief was properly to be had under Chapter X, without benefit of the express authority now contained in §328,"

which this Court held authorized the Bankruptcy Court to dismiss a Chapter XI petition since:

"... the circumstances here abundantly justified the conclusion that there was no prospect of rehabilitating the partnership."

In the present case, after reviewing the circumstances, Judge Babitt stated in his decision (A. 229):

"Clearly, this Court has inherent power to dismiss such a fragile vehicle for Chapter XI relief. *In re Ira Haupt & Co. v. Klebanow*, 348 F.2d 907 (2d Cir. 1965). This case presents an even more compelling fact pattern in the exercise of this Court's discretion in terminating the debtor's relationship with the Bankruptcy Act than in the *Haupt* case."

This same concept of inherent power to dismiss where the alleged bankrupt and creditors were aliens residing abroad was recognized in *In re Berthoud*, 231 F. 529, 534 (S.D.N.Y. 1916), *appeal dismissed*, 238 F. 797 (2d Cir. 1916).

More recently, Section 2(a)(22) and Rule 119 were adopted, specifically providing for broad discretion in the Bankruptcy Courts to proceed or dismiss where a debtor has been adjudicated bankrupt, or liquidation or rehabilitation proceedings have been commenced by or against it, in a foreign court. Section 2(a)(22) grants the Bankruptcy Court the power to:

"Exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States."

This section was added to the Act in 1962. The House* and Senate** reports stated its purpose in identical language:

"The purpose of the proposed amendment is to enable a court of bankruptcy to decline jurisdiction in

* H.R. Rep. No. 1208, 87th Cong., 1st Sess. §2 (1961).

** Sen. Rep. No. 1954, 87th Cong., 2d Sess. §2 (1962).

the event of a foreign adjudication, either temporarily or indefinitely, although the petition satisfies all relevant requirements, where justice and fairness seem to make proceedings elsewhere more desirable."

The principle recited in Section 2(a)(22) has been officially implemented by Bankruptcy Rule 119, incorporated into Chapter XI proceedings by Chapter XI Rule 11-17 ("Debtor Involved in Foreign Proceeding"), which provides:

"RULE 119

"BANKRUPT INVOLVED IN FOREIGN PROCEEDING

"When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspended the proceedings therein under such terms as may be appropriate."

Since it is specifically alleged in ¶2 of Finabank's Petition that the proceeding now pending before the Geneva Court of Justice and instituted by Finabank's own Petition, contemplates the rehabilitation of Finabank, it is undisputed that the discretion granted the Bankruptcy Court by Rule 119 was applicable in the present proceeding.

POINT III

There are ample grounds in the record to sustain the dismissal.

The Bankruptcy Court made the following findings of fact:

- (1) "This Court is satisfied that this Chapter XI cannot comply with the most elementary and preliminary provisions of the Act, much less with successful end result." (A. 227)
- (2) "The Court finds that here there is neither purpose to achieve the desired result nor likelihood of doing so." (A. 229)
- (3) "For one thing, this Court is not even informed, nor has it been, of who the creditors are. There is no basis upon which this debtor can formulate a plan affecting those creditors." (A. 229)
- (4) "The bank has no 'going concern' value to preserve because there is no going business." (A. 230)
- (5) "The Court has been given no inkling that this debtor has even considered an accord with creditors (presumably because the creditors, *i.e.*, the depositors, are being dealt with abroad) and the Court finds, on this ground as well, that the sole purpose of this Chapter XI is to frustrate the attachments and nothing more." (A. 230)

Reviewing these findings upon the entire record, Judge Ward found no error in the fact-findings. Indeed, Judge Ward specifically approved findings (2) and (5) *supra* (A. 280 and 281 respectively) and therefore affirmed the discretionary dismissal of the Petition.

These findings, as intervenor Firestone freely concedes (Br., p. 5, *et seq.*), are tantamount to a finding that these proceedings were not maintained in good faith. The Bankruptcy Court, as a court of equity* has always before it the issue of good faith and may at any stage of the proceeding dismiss for want of it. As the Court said in a Section 74 proceeding, *In re Tinkoff*, 85 F.2d 305, 307, 308 (7th Cir. 1936):

"One of the propositions put forth, if we correctly understand it, is that, once the District Court receives the petition and it is filed, the good faith of the debtor in presenting it is thereby determined, and may not thereafter be again considered by the District Court. With this proposition we are not in accord, but are of the opinion that if at any time in the proceedings the District Court finds that the proceedings were not instituted or prosecuted in good faith, the debtor's petition may be dismissed.

* * *

"The most important inquiry, and the one in which the others are in large measure bound up, is as to the debtor's good faith in presenting and prosecuting her petition. Good faith or the want of it may be determined not only from conditions as they existed at the time the petition was filed, but may be influenced by subsequent proceedings and acts. If one filing such a petition willfully neglects and refuses to present proper schedules, or to take other steps reasonably necessary for expediting the proceedings, this may justify the conclusion that the debtor is not in good faith prosecuting his undertaking, and did not in good faith begin it."

Cf. Sumida v. Yumen, 409 F.2d 654, 659 (9th Cir. 1969) *subsequent appeal* 444 F.2d 1281 (1971), *cert. denied*, 405 U.S. 964 (1972) (Chapter XII).

* *Katchen v. Landy*, 382 U.S. 323, 327 (1966) and cases cited.

Cases defining "good faith" in the analogous Chapter X context demonstrate that Finabank's proceeding failed to measure up to that standard. The Third Circuit defined "good faith" in *In re Business Finance Corp.*, 451 F.2d 829, 834 (3d Cir. 1971), as follows:

"Good faith imports an honest intention on the part of the petitioner to effect a reorganization, together with a need for and possibility of effecting it, and, in determining whether a Chapter X proceeding was filed in good faith the Court is required only to ascertain whether it was reasonable to expect that a plan could be effected; that there was opportunity and need for reorganization, and that the petition was filed with honest intention of effecting it and not for the purpose of hindering and delaying creditors"

At once the most obvious and critical deficiency in Finabank's Chapter XI proceeding was its steadfast and willful refusal to disclose the names of most of its creditors, including its depositors and other unsecured creditors.* An absolute minimum threshold requirement of a Chapter XI proceeding is the filing by the debtor of "a list of all the debtor's creditors and their addresses," and indeed the

* Intervenor Firestone concedes this in its brief (p. 15) as follows:

"Central to the conclusions of the Courts below—and probably decisive—is the fact that, by reason of Swiss bank secrecy laws, Finabank could not reveal the names of its depositors without their permission. From this, both courts below concluded—and correctly concluded—that a standard, garden-variety American Chapter XI proceeding was not possible, and that Finabank knew this from the outset. This may be the basis upon which the courts below concluded that the petition here was filed in bad faith, i.e., that Finabank knew at the time of filing that it could not meet the requirements of Chapter XI that it supply the names of its creditors. This inability of Finabank would apply with equal force whether Finabank had filed for straight bankruptcy or had filed under Chapter X." (Footnote omitted.)

Clerk may not accept such a petition unless it is accompanied by such a list. Rule 11-11(b) under Section 324.

Finabank's Petition purported to comply with this requirement and thus misled the Clerk into accepting its filing, but in fact admittedly it listed only one type of creditor—other banks. Finabank concedes that it has never filed a list of its depositors or other bank customers because, as it asserted in its brief below (Dist. Ct. Br., p. 31), "the debtor was prohibited by the Swiss Bank Secrecy Act from disclosing the names of those individuals."

As noted earlier, these unlisted "individuals" include, according to Finabank, "owners" of \$11,000,000 of the \$12,500,000 held at CBI in Finabank's name allegedly as a fiduciary for the owner; and they also include all of its other unsecured creditors whose claims are asserted in Finabank's Schedule A-3 to total over 64 million Swiss francs, none of whose names or addresses have ever been disclosed to the Bankruptcy Court.

It is obvious that no Chapter XI arrangement could ever be successfully achieved without a complete schedule of creditors. No doubt for this reason, Section 376 of the Act specifically provides for dismissal of a Chapter XI petition in the event that this schedule is not "duly filed," and itself provides ample authority for the dismissal of Finabank's Petition. Boston Bank included in its notice of motion among the grounds for dismissal Finabank's failure to annex to its Petition "a list of all its creditors pursuant to Rule 11-11(b)." Judge Babitt emphasized this failing in his findings, as quoted above.

But this was more than just a technical failure or oversight on Finabank's part. It was, of course, with the certain knowledge that, under the Swiss Bank Secrecy Laws, it could not and therefore would not comply with this most elementary requirement of the Act and Rules that Finabank filed its Chapter XI Petition deliberately omitting to schedule its creditors.

Finabank's response on this appeal to the Bankruptcy Court's point that it continuously refused, because of the Swiss Banking Secrecy Laws, to identify its creditors is to repeat:

"Once again, the issue of Swiss banking secrecy is a false one. First of all, the bankruptcy court should have held a hearing to determine the real facts about the operation of Swiss banking law." (Br., p. 29).

In fact however, as previously stated, Paragraph 4 of Dr. Mayor's affidavit (A. 48-50) submitted by Boston Bank on its motion, had fully set forth the applicable Swiss banking secrecy statutes and then summarized them as follows (A. 50):

"These provisions effectively prohibit either Finabank or Fides from furnishing to a foreign court, or from directly or indirectly making public, the names and addresses of its depositors or creditors or divulging information concerning their dealings with Finabank, even after the filing of a plan for composition with creditors or a bankruptcy."

In response, Finabank did not seek any evidentiary hearing but rather submitted the affidavit of its Swiss law expert, Charles-Andre Junod (A. 70-76). Dr. Junod did not

contradict Dr. Mayor on these points; on the contrary, he simply declared (A. 75):

“With reference to paragraph 4 of Mr. Mayor’s affidavit, I deem it unnecessary to answer it in detail, but shall simply state that neither article 273 of the Swiss Criminal Code nor article 47 of the Swiss banking law prevent a Swiss bank from initiating legal proceedings before a foreign court, including bankruptcy proceedings.”

Thus, both sides not only had the opportunity to, but in fact did, present “the real facts about the operation of Swiss Banking Law” and the mutual conclusion of their respective experts was that the Swiss Banking Secrecy Laws, even in the circumstance of the bankruptcy and liquidation of the Swiss Bank pursuant to Swiss bankruptcy law, effectively prohibited the kind of disclosure of the identity of creditors and the relevant facts which are fundamental to the letter and spirit of our Bankruptcy Act.

POINT IV

The District Court properly upheld the Bankruptcy Court’s exercise of its discretion to dismiss pursuant to Rule 119.

On this appeal, both Finabank and intervenor Firestone effectively concede that the Swiss Banking Secrecy Laws preclude compliance by Finabank with the disclosure requirements of our Bankruptcy Act. Both, however, rely upon Bankruptcy Rule 119* pursuant to which the Bankruptcy Court was expressly granted discretion (the oper-

* Quoted *supra*, p. 21.

ative word in the Rule is "may") either (a) to "dismiss" the case or (b) "suspend the proceedings therein under such terms as may be appropriate."

Since there is no dispute that Rule 119 applies to these proceedings, and is expressly relied upon by the Courts below and by the appellees as a basis for the dismissal, the only question is whether the Courts below abused their manifest discretion by dismissing rather than suspending the proceedings in favor of the Swiss Court proceedings or undertaking to fashion some sort of procedure which would contort our Bankruptcy Act and procedures in order to accommodate the Swiss Banking Secrecy Laws.

Intervenor Firestone's assignor, Bank Firestone (a Swiss banking corporation), in its brief submitted to the Bankruptcy Court in opposition to the dismissal motions, vigorously opposed any suspension in favor of the Swiss Court proceeding in a statement which is fully supported by the record, and can readily be adopted here (Br. below, p. 42):

"Should the local estate be administered locally or remitted to Switzerland? Present indications point strongly toward a local administration here. The presently proposed plan of distribution in Switzerland does not propose equality. The claims are classified by amount, with the larger amounts receiving smaller percentages. Further, and far more significantly, Finabank, on the eve of its moratorium application, claimed that the local assets here were really held by it in some secret fiduciary capacity. The validity and provability of this claim under American law is highly doubtful. If the local assets were transferred to Switzerland and the purported secret trusts allowed by Swiss law, the

local assets here would merely be diverted to prefer secret, selected creditors and not distributed on an equal basis as part of the estate. That would violate the *sine qua non* of any transfer of the assets to Switzerland."

Some of these "secret selected creditors" have partially surfaced in the CBI interpleader action pending before Judge Werker to the extent that they have asserted claims, as recent assignees of undisclosed assignors. To cite three of the largest examples, (a) ACLA International, S.A., a Panamanian Corporation, is claiming as assignee of claims totalling \$3,082,000; (b) PHI Holding Company, S.A., a Swiss Corporation, is claiming as assignee of claims totalling \$2,100,000; and (3) Etablissement Kanor, a Liechtenstein Anstalt, is claiming as assignee of claims totalling \$570,000.

In response to Interrogatories and Rule 34 Requests to each of these three claimants, who are represented by the same law firm in the interpleader action, for information and documents identifying their respective assignors, each has objected to the request:

"... as being oppressive in that disclosure of the identity of its assignors may result in the imposition of criminal penalties on such assignors in their place of residence as a consequence of the assignors' ownership of assets outside their countries of residence; ..."

Under Swiss procedures, no public record of the identity of such claiming creditors would be revealed in liquidation proceedings and Finabank apparently proposes that such restrictions could be enforced by our Bankruptcy Court in concurrent proceedings (Finabank Br., pp. 29-30).

It hardly needs saying that Professor Nadelmann, upon whose Harvard Law Review article (59 Harv. L. Rev. 1025) (written in 1946, almost 20 years before the adoption of Rule 119) Finabank and intervenor place such reliance, did not deal at all with any circumstance such as is presented here by the Swiss Banking Secrecy Laws.

In Professor Nadelmann's prolific writings, can be found support for a number of contrasting propositions. In this case, for example, it is appropriate to note that Professor Nadelmann, in the very "seminal" article referred to by appellants, was principally concerned, as the title indicates, with "Bankruptcy and Conflict of Laws" between nations, and he urged various amendments to the Bankruptcy Act. But his main emphasis was the protection of American creditors in the context of foreign bankruptcy proceedings, and to that end he urged that broad discretion be granted to the Bankruptcy Courts (59 Harv. L. Rev. at 1045):

"The first question to be considered, therefore, is the protection of the rights of local creditors in the foreign proceedings A power of discretion to declare, or to continue a second bankruptcy, after bankruptcy has been declared abroad at the domicile of the debtor, is probably the simplest way of reducing the number of needless duplication of proceedings."

And in his conclusion to the same article, Professor Nadelmann summed up his views as follows (59 Harv. L. Rev. at 1059):

"The various weaknesses of the provisions in the National Bankruptcy Act indicate the need for a revision to better protect local interests and at the same time facilitate international cooperation."

It is unnecessary and bootless to speculate as to what Professor Nadelmann's views might have been in the circumstances presented by the present appeal. Both Section 2(a)(22) and Rule 119, whether they are or are not what Professor Nadelmann espoused, clearly grant to the Bankruptcy Court broad discretion to dismiss in the circumstances of this case, and each sets forth the same criteria for the exercise of that discretion, directing the court to act "having regard to the rights or convenience of local creditors and to all other relevant circumstances." Applying these two criteria, the Bankruptcy Court was clearly within the proper bounds of its discretion in dismissing rather than suspending the American proceedings "... so that the foreign proceedings may go forward regardless of their dissimilarity from our own." (Babitt, J., A. 232).

A. "The Rights or Convenience of Local Creditors"

Judge Ward, with respect to this subject matter, found as follows, after noting Finabank's plea in favor of its foreign creditors (A. 283):

"However, as to 'the rights of local creditors,' there appear to be only four American creditors, Mario Einaudi upon whose claims of direct ownership of interpleaded funds totalling \$160,000 Judge Werker has granted summary judgment in the interpleader action; First National City Bank which claims \$138,803; and Boston Bank and Chase whose claims total approximately \$10,000,000 of the \$12,500,000 standing in Finabank's name in this district. With the possible exception of First National City Bank's relatively minor claim, dismissal has no adverse effect on the American creditors but to the contrary, represents a step toward assuring that they will each recover the sums due them

without having to rely on Swiss bankruptcy procedures which are enmeshed with the Swiss bank secrecy laws. Thus, contrary to Finabank's contention, the claims of local creditors appear best protected by dismissal of the case."

It should be noted that the claim of First National City Bank ("Citibank") is actually a conditional claim and has been asserted only in the interpleader action and not in the Bankruptcy proceeding. The claim asserts merely that Citibank paid \$138,803 to CBI "for the account of Finabank," that Finabank "asserted that said payment was made by mistake" and that CBI has failed to repay the sum to Citibank upon its demand. Citibank did not appear in opposition to the motion below to dismiss the Chapter XI Petition nor did it appear on the appeal before Judge Ward.

On the other hand, were the funds held at CBI subjected to Swiss jurisdiction, it is clear that at least \$11,000,000 of the \$12,500,000 would be paid over to secret depositor-claimants without any opportunity on the part of the American creditors to challenge their claims effectively or even know who they are. (Exhibit D annexed to Notice of Motion—A. 41-2.)

Neither Judge Ward nor Judge Babitt was willing to subject the local creditors to such unfair circumstances, stating (A. 283, 231):

"... this Court does not shirk from giving the attaching creditors the advantage over foreign creditors which dismissal of this case will insure. *See Disconto Gesellschaft v. Unbreit*, 208 U.S. 570, 582 (1908) where the Supreme Court noted at 582 "... the well

recognized rule between states and nations which permits a country to first protect the rights of its citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond its borders.' "

Nothing to the contrary was held by this Court in *Israel-British Bank*, *supra*, despite appellant's strained invocation of that case. Indeed, one of the impulses which moved the Court in that case (which did not involve Rule 119 at all) was the very concern for the protection of local, non-secret, American creditors that Finabank characterizes as "xenophobic"; for the Court specifically noted (536 F.2d at 515):

"This is a case where United States creditors could be harmed if preferential liens were permitted to survive."

Here, there are well supported concurrent findings, in Judge Ward's words, that "... contrary to Finabank's contention, the claims of local creditors appear best protected by dismissal of the case." (A. 282-3).

B. "Other Relevant Circumstances"

None of the commentators, to say nothing of any court, has ever remotely suggested that an American bankruptcy court should, pursuant to Rule 119, retain concurrent jurisdiction in the teeth of the patent impossibility of enforcement of our Act concurrently with obedience to the Swiss Bank Secrecy laws. This impossibility is highlighted by the proposed procedure for reviewing Finabank's relevant records for the purpose of the Chapter XI proceeding "without any violation of Swiss law" which

was set forth in Finabank's affidavit in opposition to the dismissal motion (A. 53):

"This entails requesting the United States Court to provide for a rogatory commission to the Geneva Court of Justice, which would with the assistance of any delegate of the United States Court, review all relevant documents of the debtor."

Judge Babitt was correctly of the view that such bizarre procedures were completely inappropriate to the exercise of concurrent jurisdiction and resulted in his conclusion upheld by Judge Ward on appeal, to exercise his discretion to dismiss the Chapter XI proceeding entirely.*

The main circumstance cited by Finabank (Br., p. 15, *et seq.*) for its contention that Judge Babitt abused his discretion by dismissing the proceeding is that thereby he permitted the attachments of the American banks to stand. In addition to what has already been said on that score, it is important to note that Finabank has no rights under Swiss law in its present proceedings before the Geneva Court of Justice to void the attachments (Mayor Affid., ¶5, A. 50). Thus, but for the Chapter XI Petition, the attached property would go to the attaching creditors. The Court should not assume jurisdiction merely to afford a foreign corporation rights which it would not have under its own law, particularly when the effect would be to severely undercut the rights of local creditors.

* As a further example of Finabank's inability to comply with American procedures, it has refused to produce any documents requested under Rule 34 in the interpleader action except "subject to the applicable provisions of Swiss law pertaining to Confidentiality of Banking Transactions" in *France*, since Swiss law prohibits foreign court procedures within its boundaries.

Moreover, this Court has recently laid down the guideline with respect to the exercise of jurisdiction over matters which are predominantly foreign. Said Judge Friendly for a unanimous court in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975):

"When, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."

The Courts below were correct in declining to be drawn into the internal affairs of a Swiss bank and to attempt to deal with its myriad of European creditors and transactions especially where there is adequate remedy under Swiss law for the rehabilitation or liquidation of the bank. *Cf.*, *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935). Here, Finabank has already invoked the Swiss law of bank insolvency and the jurisdiction of a Swiss tribunal thoroughly familiar with these precise matters.

Sound policy, in the nature of a doctrine of *forum non conveniens*, implicit in Bankruptcy Rule 119, compels that our courts decline jurisdiction. *Cf. Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956). In addition to language and other related problems of an administrative nature (such as notice to creditors, etc.), nearly all relevant contacts in this case are with Switzerland. *Cf. J. F. Pritchard & Co. v. Dow Chemical of Canada, Ltd.*, 331 F. Supp. 1215, *aff'd*, 462 F.2d 998 (8th Cir., 1972) where the court sets forth a "nexus" test which may be determinative of *forum non conveniens*. The vast bulk of the estate is located

in Switzerland, and with the exception of the Boston Bank and Chase Bank, both of whom oppose retention of jurisdiction by this Court, all of the major creditors are non-Americans.

In short, there is no public interest in this forum to commend exercise of jurisdiction here, or to justify the allocation of "the precious resources of United States courts" to bankruptcy proceedings involving foreign banks, which have so heavily occupied the courts below recently. As Judge Friendly puts it in *Bersch*, this Court should "leave the problem" to Switzerland.

In summary, the dismissal of this proceeding achieved an equitable result which best harmonizes federal bankruptcy principles and Swiss law, "having regard to the rights and convenience of local creditors and other relevant circumstances." Dismissal relieved the Court of a complex and burdensome task and avoided irreconcilable conflict with Swiss Bank Secrecy law, while leaving Finabank free to proceed under Swiss insolvency law which specifically deals with banks in a forum accustomed to dealing with the problems involved and having within its jurisdiction the bulk of Finabank's assets. This debtor, having improperly invoked the protection of the Bankruptcy Court, should not have been extended the benefits of the Act either in Chapter XI proceedings or in bankruptcy, and the Court below did not abuse its discretion by declining to retain jurisdiction solely to permit avoidance of the attachments for the benefit of foreign creditors.

Conclusion

For the foregoing reasons, the Order appealed from should be, in all respects, affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
In the Matter :
of :
BANQUE DE FINANCEMENT, S. A., : AFFIDAVIT OF SERVICE
Debtor-Appellant : ON PERSON IN CHARGE.
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:
:
:
:
:
-----X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MORRIS SOLODOFF being duly sworn, says: I am
employed in the office of Breed, Abbott & Morgan, 1 Chase
Manhattan Plaza, New York, N.Y. 10005, attorneys for the
First National Bank of Boston in the above action.

On the 30th day of November, 1976, I served
the annexed BRIEF OF THE FIRST NATIONAL BANK OF BOSTON, APPELLEE

on the attorney(s) listed below by delivering the same to
and leaving the same with the person in charge of said office(s).

Milbank, Tweed, Hadley & McCloy, Attorneys for The Chase Manhattan
Bank, N. A. One Chase Manhattan Plaza, New York, N.Y. 10005

Ford Marrin Esposito Witmeyer & Bergman, Attorneys for Banque de
Financement, S.A., 25 Broadway, New York, New York 10004

Cleary, Gottlieb, Steen & Hamilton, Attorneys for Firestone
Tire & Rubber Company, One State Street Plaza, New York,
New York, 10004

Sworn to before me this
30th day of November, 1976

DONALD L. PRICE
NOTARY PUBLIC, State of New York
No. 24-6439300
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

Morris Solodoff

Service of _____ copies of the
within _____ is hereby
admitted this _____ day of
_____. 19____
Signed _____
Attorney for _____